United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

original

74-1311

United States Court of Appeals

FOR THE SECOND CIRCUIT

Case No. 74-1311

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs-Appellees,

against

HOWARD H. CALLAWAY, individually and as Secretary of the Army, Department of Defense, U.S.A., LT. GENERAL WILLIAM C. GRIBBLE, individually and as Chief of Engineers, Corps of Engineers, U.S. Army and COL. HARRY W. LOMBARD, individually and as District Engineer, New York District, Corps of Engineers, U.S. Army,

Defendants-Appellees,

and

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant-Appellant.

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. IN REPLY TO THE CORPS AND TO SCENIC HUDSON *et al.*, AND BRIEF ANSWERING SCENIC HUDSON'S CROSS APPEAL

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Part I of this brief replies to the answering briefs of Scenic Hudson and the Corps on Con Edison's appeal from that part of the judgment below which requires Con Edison to seek and obtain a permit under §404 of the 1972 Water Act.

Part II of this brief answers the two points raised in Scenic Hudson's cross appeal. These points are Scenic Hudson's assertions (1) that the District Court should have enjoined all construction under the Project license, and (2) that a Corps permit is required under §10 of the 1899 Rivers and Harbors Act.

PART I

REPLY TO ANSWERING BRIEFS OF SCENIC HUDSON AND OF THE CORPS

SECTION 404 OF THE 1972 WATER ACT DOES NOT APPLY TO HYDROELECTRIC PROJECTS LICENSED BY THE FPC.

Con Edison's brief on appeal shows (Brief, pp. 14-34) that the District Court erred in concluding that a §404 permit is requisite to undertaking Project construction activities which necessitate the placement of rock and related materials into the Hudson River. Those construction activities, mandated by the FPC license, are required to construct the Project tailrace, backfill the transmission line trench, and create the Project recreational park facility (R. 52)(a)-58(a)).

The District Court incorrectly construed the applicable terms of the Federal Power Act (16 U.S.C.A. §791a *et seq.*) and the 1972 Water Act (33 U.S.C.A. 1251 *et seq.*). Section 23(b) of the Power Act mandates that:

> "It shall be unlawful for any person to *construct* . . . any [licensed project] . . . *except under and in accordance with the terms of a . . . license granted pursuant to this Act* . . ."

Section 28 of the Power Act further states:

> "That the right to alter, amend or repeal this Act is expressly reserved; but no such alteration, amendment or repeal shall affect any license theretofore issued under the provisions of this Act or the rights of any licensee thereunder".

Finally, Section 511 of the Water Act states that:

> "This Act shall not be construed as (1) limiting the authority or functions of any other officer or agency

> of the United States under any other law or regulation not inconsistent with this Act . . ."

Taken together, these provisions compel the conclusion that the 1972 Water Act is not applicable to projects licensed by the FPC, and particularly not to the Cornwall Project, licensed in 1970, prior to the effective date of the 1972 Water Act. The FPC's authority and functions under the Power Act are limited by §511 of the Water Act only to the extent that such FPC authority and functions are "inconsistent" with the Water Act.

Section 23(b) of the Power Act mandates that construction of the Project ". . . shall be *unlawful* . . . except *under and in accordance with the terms of a license granted pursuant to this Act.*" This broad command would seem to exclude, and thus conflict with, the provisions of the Water Act, but the conflict may be apparent only. The conflict is reconcilable upon the interpretation that FPC licenses issued in satisfaction of the comprehensive requirements of §23(b) necessarily satisfy the specific requirements of the Water Act. With this interpretation, Section 23(b) and the Water Act being consistent, the Power Act and Con Edison's license are not "limited", and Con Edison may go forward and construct under its license without a §404 permit.

If, however, the Power Act is "inconsistent" with the Water Act, then the Power Act is "limited", and to that degree amended, a result prohibited by §28 of the Power Act, which then makes §404 inapplicable.

The arguments of the Corps and of Scenic Hudson on this point are essentially that the Water Act has limited the operation of the Power Act. In the Corps' words, ". . . the 1972 Water Act precludes Con Edison from discharging any fill material into the Hudson River in connection with construction of the licensed Project . . . unless the company first obtains a permit . . . under §404 . . .".

(Brief, p. 12) There is no assertion here that the Corps' statutory duty is fulfilled by the *pro forma* issuance of a §404 permit compatible with and consequent upon the issuance of an FPC license. The Corps itself notes that while the Secretary of the Army has primary responsibility for issuance of the permit, the "EPA Administrator has retained . . . an effective veto" over issuance of the permit (Brief, p. 12). The Corps and Scenic Hudson maintain to the contrary that the Corps is required by §404 to consider the discharge activity independently of the FPC and to issue, condition, or deny completely a §404 permit application, notwithstanding the terms of §23(b) of the Power Act and the Project license.

The Corps and Scenic Hudson, therefore, are forced to take the position that the 1972 Water Act is "inconsistent" with §23(b) of the Power Act and with the authority granted by the FPC license. Nor can they stop there. For that position compels the conclusion that the Power Act and the FPC license have been amended and limited by the 1972 Water Act. This conclusion becomes inevitable when it is realized that, *as of the effective date of the license* (October 1, 1970) and up to the effective date of the 1972 Water Act (October 18, 1972), *there can be no doubt that Con Edison was authorized by the license to place rock in the Hudson River in connection with a construction of the Project without any other governmental permits or licenses.*

The rationalizations offered by the Corps and by Scenic Hudson do not militate against this conclusion. Both the Corps (Brief, p. 23) and Scenic Hudson (Brief, p. 15) deny that §404 amended the Power Act, arguing that §404 is merely an "additional requirement". It is, however, plain beyond need for elaboration that "additions" as well as deletions or modifications may constitute amendments to a statutory plan of regulation. In fact, the word "amend" is defined as follows:

> ". . . to alter formally by modification, deletion or *addition*" (Webster's Seventh New Collegiate Dictionary, emphasis added).

The lame excuse that the 1972 Water Act is entitled "Federal Water Pollution Control Act Amendments of 1972" (Corps Brief, p. 20; Scenic Hudson Brief, p. 15) is even less persuasive. Section 511(a) itself amends and limits the authority of Federal agencies under laws or regulations other than the Federal Water Pollution Control Act. To assert that §28 of the Power Act is operative only when a subsequent enactment is actually entitled "Federal Power Amendments" is to exalt form over substance to the point of absurdity and to nullify the legislative purpose of §28.

The result urged by the Corps and Scenic Hudson entails the conclusion that the 1972 Water Act amended the Power Act and modified Con Edison's rights under its 1970 FPC license. Having reached such a conclusion, however, the terms of §28 of the Power Act are operative and preclude application of §404 to the Project.*

As the Corps states (Brief, p. 21), § 28 stands for ". . . the principle that the parties should be able to rely on their expectations at the time a license is sought and obtained". The purpose of §28 is to protect a licensee, such as Con Edison, in the circumstances here presented. Its FPC license has been granted only following the most extensive, difficult and time-consuming proceedings. The FPC concluded that the Project, including the construction work necessary to build it, was ". . . best adapted to a comprehensive plan for improving or developing [the Hudson River] for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including

* There is no validity to the Corps' argument (Brief, pp. 14-15) that since Con Edison had to obtain a water quality certificate for the Project, "it is difficult to perceive the basis for the . . . claim that FPC licensed projects are exempt" from the 1972 Water Act. The Corps' "difficulty" is dispelled when it is realized that §21(b) of the 1970 Water Quality Act (PL-91-224) was enacted April 3, 1970, over four months before the project license was issued, on August 19, 1970. Therefore §28 could not have applied under those circumstances.

recreational purposes" (Power Act §10(a)). It found that the requirements of the National Environmental Policy Act have been fulfilled. This Court affirmed on review in *Scenic Hudson II*.

Scenic Hudson's protestations (Brief, pp. 2, 7, 33), that the "massive dumping operation" will annihilate the Hudson River fishery and signal destruction of vital aquatic life, are obviously not credible. Over many years, the environmental effects of the Project have been weighed and balanced. The construction of the park (and temporary cofferdam) were spread on the record in the FPC and New York Department of Environmental Conservation in detail, and all parties exercised at length their right to cross examine and offer evidence. Now, through mere bald, unsupported assertions, Scenic Hudson seeks not a second, but a fifth, bite at the apple.* How many more times must Con Edison be forced to defend itself in the courts from Scenic Hudson's attacks? Simple fairness cries out for relief vindicating Con Edison's established right to build Cornwall without further harassment.

Under §13 of the Power Act, Con Edison is obligated to commence "actual construction of project works" at least by October 1, 1974, or risk the consequences of losing its license. The same section obligates Con Edison to proceed with construction work in good faith and with due diligence. The interrelated requirements of the Power Act establish a comprehensive scheme of regulation for the construction and operation of hydroelectric facilities to be administered —not by the Corps—but by the FPC.** To interject Corps

*This case is the fifth. The other four are *Scenic Hudson I*, 354 F.2d 608 (2nd Cir., 1965), *cert. den.*, 384 U.S. 941 (1966), *Scenic Hudson II*, 453 F.2d 463 (2nd Cir., 1971) *cert. den.*, 407 U.S. 926 (1972), *Hudson River Fishermen's Association* v. *FPC*, Dkt. Nos. 73-2258, 73-2259, argued Feb. 11, 1974, and *deRham* v. *Diamond*, 32 N.Y. 2d 34 (1973). Scenic Hudson has also opposed the Project in the New York Public Service Commission, Opinion No. 74-2, New York Public Service Commission, PSC Case No. 26538, (Feb. 28, 1974); Opinion No. 74-11, New York Public Service Commission, PSC Case No. 26538, (April 29, 1974).

**See Part II, B of this brief, *infra*.

jurisdiction, and to set up at this stage what amounts to a separate and duplicative licensing proceeding in the Corps is to frustrate completely the Congressional purpose in the Power Act, and to undermine legally protected expectations at the time Con Edison's license was issued.*

PART II

ANSWER TO SCENIC HUDSON'S CROSS APPEAL

A.

ALTHOUGH THE DISTRICT COURT WAS LEGALLY INCORRECT AS TO § 404, THE SCOPE OF ITS INJUNCTION WAS CONSISTENT WITH THE CONCLUSION THAT A § 404 PERMIT IS REQUIRED.

On cross-appeal, Scenic Hudson persists in a thinly disguised effort to cause the lapse of Con Edison's license by contending for a complete injunction against any construction work which is possible at this time.** Its cross-appeal on this point is from the District Court's denial of Scenic Hudson's post-judgment motion for an injunctive decree against "*any* construction" of the Project by Con Edison (R. 167(a), emphasis is Scenic Hudson's). The Court's attention is called to Con Edison's response to that motion,

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* License for Project No. 2338, 44 FPC 430 (Aug. 19, 1970). Scenic Hudson's purpose in pressing for a Corps permit proceeding is, in fact, to invalidate the last ten years of FPC licensing proceedings, by urging consideration by the Corps of Engineers of issues already determined in the FPC. It would use the permit proceedings to force the reopening of a wide range of issues. In recent letters to the Corps, for instance, Scenic Hudson has demanded that the Corps reconsider gas turbines as an alternative to the Project, the need for the Project, and the complete range of issues described in *Scenic Hudson I* and *Scenic Hudson II*. It has further urged the Corps to prepare a new Environmental Impact Statement under NEPA (42 USCA 4321 *et seq.*). The Corps, it appears, will not be able to process the permit application before late 1974, at the earliest. Scenic Hudson's opportunities to seek further delay are endless.

**Actual construction of project works must commence by October 1, 1974, and continue thereafter in good faith. Con Edison's brief on appeal, p. 10. See also *Arkansas Power & Light Co.* v. *FPC*, 125 F.2d 982 (8th Cir. 1942).

contained in the record (R. 172(a)-177(a)). In the interest of brevity, it is not repeated here. The motion was denied (R. 178(a)).

As Con Edison has shown in Part I of this brief and in its brief on appeal, the District Court's injunction should be dissolved because no §404 permit is required. However, had the District Court's conclusion as to §404 been correct, the scope of injunctive relief would have been fully adequate to accomplish the purpose of the statute and the District Court's decision.* An injunction against construction work other than work which involves an actual discharge into the Hudson River would make a mockery of the Power Act, of Con Edison's license and of this Court's decision in *Scenic Hudson II*.

Scenic Hudson has sought to block the Project through a policy of "endless delay" (R. 175(a), footnote). Not a desire to vindicate any rights under § 404, but a desire to endlessly delay the project, explains its request for an injunction against any activities "directly related" to the discharge of dredged or fill materials (Scenic Hudson Brief, p. 41), including excavation of rock (*Id.*, p. 42). In other words, Scenic Hudson wants the present construction work on the project to be stopped, although, with a feigned air of magnanimity, it says it would not object to "work on the reservoir" (*Id.*, p. 44), including expenditures on such work.

If accepted, Scenic Hudson's proposed injunctive relief would probably result in termination of the license, since construction of the reservoir is not scheduled to commence before 1976, and, as at this date, all of the real estate neces-

*The proposition that an otherwise proper injunctive decree should not be disturbed, but for abuse of discretion, is well-established. *Sierra Club* v. *Hickel*, 433 F.2d 24 (9th Cir. 1970) *cert. granted*, 401 U.S. 907, *aff.*, 405 U.S. 727; *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2nd Cir. 1972); *Creamer* v. *U.S. Dept. of Agri.*, 469 F.2d 1387 (3rd Cir. 1972); *Solex Laboratories, Inc.* v. *Plastic Contact Lens Co.*, 268 F.2d 637 (7th Cir. 1959); *Cosentino* v. *United Broth of Carpenters and Joiners of America, AFL-CIO*, 265 F.2d 327 (7th Cir. 1959).

sary to commence reservoir construction has not been acquired.

The existing schedule of construction, moreover, has been determined to be the most prudent. The "critical path" items of construction are the rock excavations to construct the main power tunnel (connecting the reservoir to the powerhouse) and the other tunnels. Accordingly, the construction schedule mandates work on these features as early as possible, and before heavy commitments are made on construction of other project features (R. 54(a)-57(a)). Construction of the reservoir two years ahead of schedule, would result, then, in unwisely premature capital expenditures.

Clearly, Con Edison must be allowed to build the project in a prudent manner without expending funds prematurely or building imprudently.

The injunctive decree should be dissolved.

B.

CORPS JURISDICTION OVER THE PROJECT UNDER THE 1899 RIVERS AND HARBORS ACT WAS SUPERSEDED BY THAT OF THE FPC UNDER THE FEDERAL WATER POWER ACT OF 1920.

The District Court correctly concluded (R. 139(a)-149(a)) that a § 10 permit under the 1899 Rivers and Harbors Act is not required. Scenic Hudson's cross-appeal on this point is totally without merit.

The Rivers and Harbors Act of 1899 (33 U.S.C.A. § 401 *et seq.*) is the principal statute pursuant to which the Corps of Engineers exercises jurisdiction over activities involving the construction and operation of facilities affecting navigable waters of the United States. Pursuant

to Section 9* the consent of Congress and the approval of the Corps is required to construct certain dams, dikes and other structures in navigable waters. Pursuant to Section 10** of the 1899 Act the Corps of Engineers may issue permits authorizing construction of certain types of structures, and authorizing excavation or deposition of material in navigable waters.

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* Section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. § 401) provides: "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portion of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army".

** Section 10 (33 U.S.C.A. § 403) provides: "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same".

Were it not for the provisions of the Federal Power Act, it would appear that the construction of any bridge, dam, or dike within the Hudson River would be made unlawful by Section 9 of the 1899 Act unless the consent of Congress was first obtained and the plans had been approved by the Chief of Engineers.

Were it not for the provisions of the Federal Power Act, furthermore, it would appear a permit would be required from the Corps of Engineers pursuant to Section 10 in order to excavate or fill or otherwise modify the channel of the Hudson River and to construct other structures in the river related to the Project.

The provisions of the Federal Power Act, however, clearly supersede those of the Rivers and Harbors Act in both of these respects.

1. Background of the Federal Power Act

The Federal Water Power Act, enacted June 10, 1920, now appears as Part I of the present Federal Power Act.

The 1920 Water Power Act created the Federal Power Commission, which was originally composed of the Secretaries of War, of Agriculture and of the Interior. The Act transferred to the new Commission the powers theretofore exercised by the respective Secretaries in connection with water power development under other laws then in effect. According to the House Report on the 1920 Water Power bill (House Rep. No. 61, 66th Cong. 1st Sess.):

> "It was thought better to create a commission consisting of Cabinet officers than a new commission, necessitating large appropriations. Moreover, the clerical and expert forces of the several departments are made available for this Federal Power Commission. The powers of the commission are set forth in detail in the pending bill, as are also the duties and obligations of the grantees, upon receiving the licenses provided for in the bill . . ." (at 6)

The House Report, *supra,* contrasts the comprehensive approach of the proposed Water Power bill with the "piecemeal" approach of previous water power legislation:

> "The history of the legislation with reference to dams goes back to the River and Harbor Act of 1890. In that Act it was provided that no bridge or breakwater or pier or abutment could be constructed beyond the harbor lines where they were established, and where they were not established such obstructions could not be made without the previous consent of the Secretary of War.
>
> "Sections 9 and 10 of the Rivers and Harbors Act of 1899 provided that the consent of Congress was required for the putting in of obstructions in navigable waters. Where such obstruction was on an intrastate navigable water, notwithstanding the fact that the legislature gave consent, the Secretary of War had to pass upon the plans, specifications and the location." (at 3)

The House Report continues by tracing the history of intervening legislation and pending legislation, including the Dam Act of 1906 (34 Stat. 386), which also required the consent of Congress before a dam could be built in navigable waters, and required the approval of the specifications, plans and location of the site by the Secretary of War and the Chief of Engineers. In essence, prior to the 1920 Water Power Act, specific approval by Congress was required for each hydroelectric dam or other dam or dike project. This was the same "piecemeal" approach* which was called for under Section 9 of the 1899 Rivers and Harbors Act whereby separate Congressional enactment was required for each separate project. The Water Power Act was intended to revise substantially that piecemeal approach. (Kerwin,

*The "piecemeal approach" was recently exemplified in *Citizens for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970) *cert. denied* 404 U.S. 949 (1971).

J. G., *Federal Water Power Legislation* (Columbia University Press, New York, 1926) *passim*)

2. Operative terms of the Federal Power Act

Section 4(e) of the 1920 Federal Water Power Act empowered the Federal Power Commission to issue licenses for the construction and operation of hydroelectric projects.*

Section 23(b) of the Power Act *prohibited* construction or operation of a facility subject to the Act without a Federal Power Commission license or a valid pre-existing permit.**

Section 23(b) states unambiguously that after June 10, 1920 an FPC license would be a prerequisite to the *construction* and operation of hydroelectric projects on navigable waters. This was a radical change from the regulatory approach prior to that date.

3. The Power Act repealed all acts or parts of acts inconsistent with the Power Act

Section 29 of the Federal Power Act (16 U.S.C.A. §823) provides:

> "That all acts or parts of acts inconsistent with this act are hereby repealed: . . ."

*Section 4(e) provides that: "The commission is hereby authorized and empowered . . . (e) to issue licenses . . . to any corporation organized under the laws of . . . any state . . . for the purpose of *constructing*, operating, and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction . . ." (emphasis added)

**Section 23(b) provides that: "It shall be unlawful for any person . . . to *construct*, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto across, along or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a permit granted prior to June 10, 1920, or a license granted pursuant to this act . . ." (emphasis added)

Legislative history makes clear that the purpose of this repealer was to insure that the prior-enacted Rivers and Harbors Acts and General Dam Acts would not interfere with the new comprehensive legislative scheme established in the Water Power Act. The House Report on the bill observes:

> "The salient features of the bill herewith reported are the creation of a commission known as the Federal Power Commission, to be composed of the Secretaries of War, Interior and Agriculture. To the Commission are given the powers *heretofore exercised* by the Secretaries in connection with water power development under their several jurisdictions . . . ."
>
> "[The Water Power bill] . . . proposes a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. It provides that the administration of water powers within Federal jurisdiction, which have hitherto been handled independently by three separate departments [War, Agriculture and Interior] shall be coordinated, through a commission composed of the heads of these departments, *in order that duplication of work may be avoided,* that a common policy may be pursued, and that the combined efforts of the three agencies may be directed toward a constructive national program of intelligent, economical utilization of our power resources".* (Emphasis added) (at 5)

*This view was concurred in by the Secretaries of War, Agriculture, and of the Interior in a letter signed by all three Secretaries to Representative Sims dated February 27, 1918. 56 *Cong. Record* 2942 (1918).

In addition, in a hearing before the House Water Power Committee, Mr. O. C. Merrill of the Forest Service of the Department

a. *Administrative interpretation*

In 1921 the Attorney General of the United States was called upon to render an opinion as to the status of the Secretary of Agriculture's authority to approve transfers of water power permits affecting national forest lands under laws existing prior to the enactment of the 1920 Federal Water Power Act. The Attorney General concluded that the Secretary of Agriculture's authority ceased and was immediately vested in the Federal Power Commission upon passage of the Water Power Act:*

> "[The Federal Water Power Act] provides a complete and detailed scheme for the development and operation under public control of all the water-power resources of the public domain, reserved and unreserved and of all the navigable rivers under the jurisdiction of the United States. It creates a new body called the Federal Power Commission and places in its hands authority to investigate all the water-power resources of the United States and control their development in so far as the Government has jurisdiction either by reason of ownership of lands or control over water; and it expressly repeals "all Acts or parts of Acts inconsistent with this Act".
>
> "It seems clear that it was the purpose of Congress to bring under this Act all future power development

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of Agriculture, in testimony authorized by the Secretaries of War, Interior and Agriculture, said:

> "The first step in carrying out the purpose of the bill . . . should consist in coordinating the activities of the three departments which have to do with water power in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view that there may be no duplication of work, overlapping of functions or conflict of authority. It is proposed to accomplish this by the creation of a commission composed of the Secretaries of War, Interior and Agriculture . . . ."

(*Hearings on S. 1419 before the House Water Power Committee,* 65th Cong., 2nd Session, at 21).

* 32 Ops. Att'y Gen. 525 (1921).

within the jurisdiction of the United States and to concentrate in the hands of the Federal Power Commission all the administrative authority thereover which was in part previously distributed among the Secretaries of the Interior, Agriculture, and War. It is also clear that no further original permits, at least, were thereafter to be issued by the Secretaries. It is believed that practically all the permits issued by them are limited in time; and when they expire new licenses will be issued by the Commission and not by the Secretaries, respectively. It is therefore evident that the intent of the Act, as well as its necessary operation, is to ultimately bring under the new law and under the control of the Federal Power Commission all existing as well as all future developments". (at 528)

b. *Judicial interpretation*

Courts have consistently held that the Federal Water Power Act is a comprehensive and complete plan of regulation:

i. *First Iowa*

"[The Federal Water Power Act] was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the Federal Power to do so, *instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts* and other federal laws previously enacted.

"It was a major undertaking involving a major change of national policy [footnote omitted]. That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statu-

tory scheme of which has been several times reviewed and approved by the courts [footnote omitted]". (*First Iowa Hydroelectric Co-Op* v. *Federal Power Commission,* 328 U.S. 152 (1946) at 180) (Emphasis added)

ii. ***Chapman***

"From the time that the importance of power sites was brought to public and congressional consciousness during the administration of President Theodore Roosevelt, the significant development has been the device of a general power policy instead of *ad hoc* action by Congress with all the difficulties and dangers of local pressures and logrolling to which such action gave rise (citations omitted). It soon became clear that indispensable to a wise national policy was the creation of a commission with functions and powers comparable with those of the Interstate Commerce Commission . . . Originally, Congress entrusted its policy to a commission composed of three cabinet officers [the Secretaries of War, Agriculture, and Interior]. . . . [In 1930], the Commission was reorganized as an expert body of five full time commissioners. These enactments expressed general policies and granted broad administrative and investigative power, making the Commission the permanent disinterested agency of Congress to carry out these policies . . ." (U.S. *ex rel. Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953) at 167).

iii. ***Taum Sauk***

"The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which while unregulated might well be contradictory rather than harmonious [footnote omitted]. Prior legislation in 1890 and the Rivers and Harbors Act of 1899 [footnote omitted] pro-

hibiting the erection of any obstruction to navigation, including those on non-navigable feeders, . . . and requiring the consent of Congress and approval of the Secretary of War before constructing a bridge, dam, or dike along or in navigable waters, was thought inadequate, for it accommodated only the federal interest in navigation. . . . " (*FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965) at 98).

iv. *Scenic Hudson II*

"In the Federal Power Act Congress granted the Commission 'sweeping authority and a specific planning responsibility' . . ." (*Scenic Hudson Preservation Conference* v. *FPC*, 453 F.2d 463 (2d Cir. 1971) at 467).

v. *Northwest Paper*

". . . The various Acts of Congress forming the background for the Federal Power Act of 1920 . . . are indicative not only of an attention to fully develop the water power resources, and to protect the national interest, but of an intention to centralize the authority over such resources in one Government agency . . .

". . . [The Federal Power Act] was designed to vest in the Commission for the future, the control and jurisdiction which Congress had previously exercised . . ." (*Northwest Paper Co.* v. *FPC*, 344 F.2d 47 (8th Cir., 1965) at 51, 52).

4. The Rivers and Harbors Act of 1899 was superseded with respect to hydroelectric projects licensed pursuant to the Federal Power Act

The legislative history, the opinion of the Attorney General, and the court decisions show that the fundamental purpose of the Power Act, in establishing a single Federal agency to regulate water power development, was to avoid duplication among various federal agencies, and so to

facilitate the development of a common national policy. These sources specifically acknowledge a deliberate legislative purpose to abolish the prior piecemeal systems formerly in effect with respect to hydroelectric development.

Section 23(b) of the Power Act clearly provides that both *construction* and *operation* of hydroelectric facilities shall be "unlawful" unless an FPC license or some other pre-1920 authorization is in effect. Section 4(e) of the Power Act authorizes the FPC to issue such licenses pursuant to terms and conditions. Section 29 of the Power Act repealed all inconsistent statutes in effect prior to 1920.

These Power Act provisions constitute a Congressional delegation of exclusive authority to the FPC to regulate and license hydroelectric development. The Power Act supedseded and transferred to the FPC the authority previously exercised under Sections 9 and 10 of the 1899 Act by Congress and the Corps.

If not superseded by the Power Act, Section 9 of the 1899 Act would require that developers of hydroelectric projects obtain special Congressional legislation in addition to an FPC license. Unless a *pro tanto* repeal of the previously enacted legislation had been effected by the Power Act, all hydro projects built after 1920 under FPC license without additional express Congressional enactment would have been built in violation of Section 9.

Section 10 of the 1899 Act is a refinement of Section 9, and must be read with it *in pari materia*. Section 10 prohibits the creation of any obstruction "not affirmatively authorized by Congress" and then delegates to the Corps the authority to permit certain classes of construction activity in navigable waters. (See *Wisconsin* v. *Illinois*, 278 U.S. 367 (1928) at 412). With the Water Power Act

Congress enacted a more specialized statute applicable to the construction of hydroelectric "project works"* which delegated authority to license such works to the FPC. Thus an FPC licensed project is "affirmatively authorized by Congress" under the Power Act. The construction of such a project is not "prohibited" by Section 10 any more than it would be by Section 9. Section 10 was also superseded insofar as hydroelectric facilities are concerned, just as was Section 9.

These conclusions are supported by numerous cases holding that hydroelectric projects built before 1920 under special acts of Congress were brought within the jurisdiction of the FPC by the Power Act. In *Northwest Paper Company* v. *FPC,* 344 F.2d 47 (8th Cir. 1965), the FPC ruled that the owner of a project constructed under an 1866 special act should apply for an FPC license, since the original project works had been substantially modified and rebuilt over the years. The crucial issue was whether the special act, which gave the ". . . consent of the Government . . . to construct across the Mississippi River a dam . . . for water power and other purposes . . .", clothed the project owner with indefeasible rights to build and rebuild in perpetuity. The Court held that it did not, first reciting

*Section 3(12) of the Power Act (16 USCA 796(12)) defines "project works" as "the physical structures of a project." Section 3(11) (16 USCA 796 (11)) defines "project" as the "complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit; . . ."

the comprehensive nature of the Power Act and then stating that:

> ". . . [the Power Act] was designed to vest in the Commission for the future, the control and jurisdiction which Congress had previously exercised . . . The Commission logically argues, 'It is unreasonable to assume, . . . that Congress was delegating to a specialized expert body the obligation of securing comprehensive development of the nation's power resources, while reserving to itself the responsibility of continued surveillance over all locations where any developments had been constructed under previously granted permits'" (at 52).

Another Court has written that the *Northwest Power* decision:

> ". . . held that congressional authority specifically reserved by prior piecemeal legislation was transferred by a general statutory delegation [the Power Act] to the Federal Power Commission . . ." (*Sisselman* v. *Smith,* 432 F.2d 750 (3rd Cir. 1970) at 753).

The comprehensive regulatory scheme set forth in the Power Act includes review by the Corps of an FPC applicant's proposed plans under §4(e) of the Power Act.* An additional construction permit from the Corps issued pursuant to §10 of the 1899 Act would be duplicative and inconsistent with §4(e) of the Power Act.

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* Section 4(e) (16 USCA 797(e)) states that "[t]he Commission is hereby authorized and empowered—(e) to issue licenses . . . for the purpose of constructing, operating, and maintaining . . . project works . . . *provided further,* that no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army . . ."

Con Edison's plans for the project were reviewed by the Corps under §4(e) (R. 48(a) and 49(a)). 44 FPC 359 (1970) at 388.

Considerations of administrative efficiency as well as legislative history and judicial interpretation support this view. The requirement of Judge Hays' opinion in Scenic Hudson I—that all factors relevant to the proposal be considered in reviewing the FPC application*—a requirement which the Second Circuit found to have been met with respect to the Cornwall Project,** is duplicated by the Corps' requirements for §10 permits.† If followed for the Cornwall Project, these §10 procedures would involve reconsideration of issues thoroughly covered in eight years of litigation before the FPC. Such a procedure would merely duplicate the FPC's regulations, in a manner wholly inconsistent with the entire comprehensive regulatory scheme of the Power Act. Such needless duplication of Power Act responsibilities reinforces the position that, with regard to hydroelectric projects, §29 of the Power Act was intended to assure the supersession of §10 of the 1899 Act by the Water Power Act.

The conclusion that Sections 9 and 10 of the 1899 Act are inapplicable to the Cornwall Project is supported by the fact that various provisions of the Power Act itself give affirmative responsibilities to the Corps of Engineers. Section 4(e) provides that the Corps must approve the plans of "the dams or other structures affecting navigation". Sections 10(c) and (g) authorize the FPC to regulate projects for the protection of navigation, health, life and property and to make further conditions as are consistent with the Act. In conformity with these sections, the FPC has conditioned the permit on the participation of the

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**Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

***Scenic Hudson Preservation Conference* v. *FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

†See 38 Fed. Reg. 12217 (May 10, 1973) at §201.120(f) for the Corps policies for evaluating applications.

Secretary of the Army in the review of key portions of the Project.*

Thus, Congress and the FPC have preserved the Corps' traditional role as guardian of navigable capacity, but insofar as hydroelectric facilities are concerned, this role is maintained under the framework of the Federal Power Act, not under the authority granted to the Corps by the Rivers and Harbors Act of 1899.

The Corps' former regulations** acknowledge that the FPC has primary responsibility under the Federal Power Act for hydro projects, and that the Corps statutory

* Section 10(c) of the Power Act (16 USCA 803(c)) provides that "the licensee shall maintain the project works in a condition of repair for the purposes of navigation . . . , shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property . . ."

The license provisions are as follows (32 FPC 839 (1964) at 840):

> "Article 6. Insofar as any material is dredged or excavated in the prosecution of any work authorized under the license, or in the maintenance of the project, such material shall be removed and deposited so it will not interefere with navigation, and will be to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.
>
> "Article 7. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operation of the Licensee, so far as they affect the use, storage and discharge from storage of the waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate . . . as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned".

** 33 Fed. Reg. 18670 (1968).

responsibility is limited to the provisions of § 4(e) of the Power Act. Subsection (d)(9) of those regulations states:

> "On April 7, 1965, the U.S. Court of Appeals for the 8th Circuit in *Northwest Paper Company* v. *Federal Power Commission* (344 F.2d 47, CA No. 17,679, Apr. 7, 1965), concluded that *by the Federal Water Power Act of 1920 Congress centralized the authority over water power projects in the Federal Power Commission.* The same Court on the same date reached the same conclusion in *Minnesota Power & Light Company* v. *Federal Power Commission* (344 F.2d 53, CA 8 No. 17,680, Apr. 7, 1965). The effect of the April 7 decisions was to affirm the opinion of the Attorney General of May 3, 1921 (32 Op. A.G. 525), that the functions of the Chief of Engineers and the Secretary of the Army to authorize non-Federal water power projects or modifications of existing pre-1920 non-Federal water power projects were transferred to the Federal Power Commission by the Federal Water Power Act of 1920 (41 Stat. 1063). Applications for approval of repairs, maintenance or modifications for non-Federal water power projects authorized under the River and Harbor Acts as well as special Acts of Congress prior to 1920, or requests for advice with respect thereto are referred by the District Engineer to the Federal Power Commission for consideration in accordance with the provisions of the Federal Water Power Act. The District Engineer will advise the applicant of the referral of the application to the Federal Power Commission for consideration. In the event a commission license is necessary to authorize modifications, the project plans affecting navigation would be submitted by the Commission to the Chief of Engineers and the Secretary of the Army for approval prior to the issuance of any such license in accordance with Section 4(e) of the Federal Water Power Act. Such approval would in effect constitute approval of modifications to the original structure as contemplated by the early River and Harbor Acts

and Special Acts of Congress prior to 1920". (Emphasis added.) (33 F.R. at 18672).

The regulation is evidence of the Corps' understanding that its duties under pre-1920 legislation were "transferred" to the FPC under the Water Power Act of 1920, and that any Corps approvals required under the 1899 Act were replaced by approvals under §4(e). Such a long-standing interpretation by an agency of its own powers is entitled to great weight. (*Wisconsin* v. *Illinois*, 278 U.S. 367, (1929) at 413; *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140 (D. Ct. Ala. (1971) at 1147).

CONCLUSION

The District Court's injunction should be dissolved, and a declaratory order should be entered holding that Con Edison is not required to obtain a §404 permit in order to construct the Cornwall Project.

The District Court's ruling as to §10 should be affirmed, and the cross-appeal should be dismissed.

Respectfully submitted,

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Dated: May 13, 1974

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Andrew Gansberg

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Scenic Hudson Preservation Conference et al.

Plaintiffs-Appellees-Appellants,

-against-

Callaway et al.

Defendants-Appellees,

and

Consolidated Edison Company of New York, Inc.

Defendant-Appellant-Appellee.

- - - - - - - - - - - - - - - - - - - -x

No. 74-1311

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ANDREW GANSBERG, being duly sworn, deposes and says:

1) That he resides at 43 Wimbleton Lane, Great Neck, New York 11023, is over the age of eighteen years and is not a party to this action;

2) That on May 10, 1974, he personally deposited in the United States mail receptacle at One Chase Manhattan Plaza, New York, New York 10005, envelopes securely wrapped with correct postage affixed containing 2 true and complete copies each of the attached "Brief of Consolidated Edison Company of New York, Inc. in Reply to the Corps and to Scenic Hudson et al., and Brief Answering Scenic Hudson's Cross Appeal" addressed to the following attorneys representing the named parties to this action:

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Defendants-Appellees.

Andrew Gansberg
Andrew Gansberg

Sworn to before me this 10th

day of May, 1974

Carol Wagner
Notary Public

CAROL WAGNER
Notary Public, State of New York
No. 24-4120745
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1975